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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 544

HARRY A. GAIR, EMILE Z. BERMAN, ROBERT C. KILROE, DAVID C. BRODERICK and JOHN J. TULLMAN,

Appellants,

v.

The Honorables DAVID W. PECK, CHARLES D. BREITEL, BERNARD BOTEIN, BENJAMIN J. RABIN, MARTIN M. FRANK, FRANCIS L. VALENTE and JAMES B. M. McNALLY, individually and as Justices of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department,

Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

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Appellees have moved to dismiss this appeal *solely* upon the ground "that the appeal does not present a substantial federal question." (Motion to Dismiss Appeal, p. 1). Their motion does not challenge the fact that the appeal was taken in conformity to statute and the rules of this Court or that the Federal question sought to be reviewed was timely and properly raised and expressly passed upon. There is no contention that the judgment rests on an adequate non-Federal basis. There is no challenge of the citations set forth in our Jurisdictional Statement and no cases are cited by appellees to the effect that any of the questions raised by us have previously been decided adversely to our various contentions by this Court.

Appellees' arguments to the effect that the constitutional questions presented are not substantial are found at pages 6-8 of their motion papers. We now answer them, *seriatim*, without repeating the material already briefed at pages 12-21 of our Jurisdictional Statement (under the heading: "The Questions Are Substantial").

I

Appellees state that, although "the constitutionality of Rule 4 was briefed and argued in the courts of New York State, and thus drawn in question, this Court should decline jurisdiction on the ground that the constitutional questions presented are not substantial in character." They cite *Zucht* v. *King*, 260 U. S. 174. The slightest reading of *Zucht* v. *King* will show that it has no application to the situation now at bar. There, this Court declined jurisdiction *because a long line of decisions had previously passed on the constitutional point presented adversely to the contentions of the plaintiff in error.* No such dilemma now confronts us; because *no* decision of this Court has so passed upon the constitutioaal points here presented, *none* has been cited by appellees and appellees have made *no* effort to contradict the citations in our Jurisdictional Statement of decisions in our favor, or to seek to differentiate *any* of them.

II

Appellees argue that the "lack of substance that inheres in these constitutional issues" is demonstrated by the failure to mention those issues in the course of all but one of the opinions, below. Appellees made precisely this argument before the New York Court of Appeals in resisting our motion before that Court to have the remittitur amended. Point II of their submission on

that motion to the New York Court of Appeals read as follows (Brief of defendants-appellants on Motion for Reargument, pp. 5-6):

> "Both on the oral arguments and in the briefs before this Court and in the two lower courts counsel for the plaintiffs-respondents urged that the Rule was unconstitutional under the Constitution of the United States in that it operated as a denial of due process of law and the equal protection of the laws. The briefs of the defendants-appellants did not treat of this constitutional question since it was deemed lacking in substance. Similarly the opinions of the Special Term, Appellate Division, the majority opinion of this Court and the dissenting opinion of Judge Froessel did not advert to the argument and the only judicial reference to it is found in the concluding sentence of the dissenting opinion of Judge Burke in this Court.
>
> "Under these circumstances, it is difficult to discern how it can be said that the judgment of this Court included a resolution of the constitutional question unless the fact that the question is raised in and of itself ordains such a result."

The New York Court of Appeals, which certainly was in the best position to know whether it had regarded the constitutional questions as substantial, overruled the contention above quoted and certified that it had necessarily passed upon the constitutional questions here under consideration (Order Amending Remittitur, set forth at pages 4c-5c of the Jurisdictional Statement, herein).

Furthermore, the circumstances of the decisions below were such that it would have been completely inappropriate for either the New York Supreme Court (the court of original jurisdiction) or the Appellate Division (the first appellate court) to mention the constitutional points, since *they never had to be reached as a basis for decision*

in either of those courts, due to the fact that, upon *State* statutory grounds, each of those courts ruled in favor of the plaintiffs (here appellants). It was only in the Court of Appeals that it was necessary to make a determination on the constitutional points, since that Court ruled in favor of the defendants (here, appellees) as far as *State* statutory grounds were concerned and, therefore, had to pass on the Federal constitutional issues.

Parenthetically, it should be observed that the present motion inaccurately states that the majority opinion in the Court of Appeals did not treat the constitutional question. Actually, the majority opinion specifically stated that the effect of Rule 4 was such that it is "not subject to attack on the grounds that it is parochial" (6 N. Y. 2d at page 108).

III

Appellees urge that our Jurisdictional Statement "proceeds on the wholly unwarranted assumption that the courts of New York State are free to disregard the interpretation placed upon the Rule by the Court of Appeals." There is no such assumption in our Jurisdictional Statement and none was intended to be made.

Baird v. *Kruska*, 259 U. S. 563, cited at page 7 of appellees' motion, has no application to our contention in the case at bar. Our claim of constitutional infirmity rests upon the proposition that, *even accepting the construction given to Rule 4 by the New York Court of Appeals*, the Rule violates the constitutional rights of appellants. As we have demonstrated in our Jurisdictional Statement, the Court of Appeals could not, by construing Rule 4 as a rule of evidence foreclose this Court from reviewing that construction. *Truax* v. *Corrigan*, 257 U. S. 312, 324, 66 L. Ed. 254, 259.

IV

Appellees argue that, for the purpose of this litigation, we have conceded that Rule 4 is a necessary one in the First Judicial Department. *There has been no such concession made by us at any time in the course of this litigation.*

By the mutual consent of *all* parties, the question of the necessity or desirability of the Rule was eliminated from the case at the time of its first presentation to the New York Supreme Court (the court of original jurisdiction). The moving affidavit for summary judgment stated the following (Papers on Appeal to the Court of Appeals fols. 25-26):

> "The sole question presented for determination in this cause is whether it was within the power of defendants to promulgate the said Rule and whether it is presently within their power to enforce it. Whether the Rule is good or bad, necessary or unnecessary, desirable or undesirable, fair or unfair, responsive or not to the ethical and moral standards of the community, serving or damaging to professional and public interests, it is our contention that the Appellate Division was without power to adopt the Rule and is without power to enforce it. It is the purpose of the present action to obtain a declaratory judgment whether the power does or does not exist."

The answering affidavit on behalf of the defendants (there, appellees) of [then] Presiding Justice PECK *confirmed the non-existence of any alleged concession* as to the necessity, desirability or fairness of Rule 4 in the following language:

> "I have read the affidavit of Emile Zola Berman,

one of the plaintiffs herein, submitted in support of the motion for summary judgment. The defendants are in agreement with the position of the plaintiffs set forth in said affidavit, that the only issue presented in this action is the power of the defendants as Justices of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department to adopt and carry out Rule 4 of the Special Rules Regulating the Conduct of Attorneys and Counselors-at-Law in the First Judicial Department *and that no question respecting the necessity, the desirability and the fairness of the Rule is here involved.* The defendants also agree with plaintiffs' position that this is a proper question for determination in this action and that no triable issue of fact is presented by the pleadings." (*Ibid.*, fols. 44-45, italics supplied).

Flying in the face of this clear *elimination* of any thought of concession, the majority opinion of the New York Court of Appeals nevertheless stated that the *basis* of its decision was the existence of the so-called concession. There is not a *scintilla* of evidence in the record to support this unwarranted assumption. There is not a *scintilla* of proof in the record to justify classification. The concurrence of these faults is the basis for question numbered 6 as set forth at page 6 of our Jurisdictional Statement.

V

It is stated at pages 7-8 of the motion that, for many years, Special Rules respecting contingent fee arrangements have prevailed in various Judicial Departments of New York State. This statement is misleading. There is *no* rule regulating the amount of fees in any Department except the First Judicial Department. The *only*

rule presuming so to regulate compensation of attorneys is Rule 4, presently under attack in this action."

VI

Appellees argue that Rule 4 does not operate directly on the contract of compensation or the right to enforce it in an action based on the contract. Appellees' argument seems to be that an action might technically be brought by an attorney to enforce the contract, *even though he could be disbarred for bringing the suit!* But they *cannot* within the boundaries of serious contention say that one is not deprived of a right when his attempt to enforce that right in a court of law could lead to his professional destruction.

It is significant that, although they now indicate otherwise, the appellees (then appellants) in their brief to the Appellate Division, Third Department, *admitted* that Rule 4 would restrain attorneys from enforcing their retainers. Appellees' brief there stated (at pages 19-20):

> "[t]hat the indirect (or, for that matter, direct) effect of the rule may be to restrain attorneys from enforcing retainers . . .".

VII

Appellees state that neither they nor any other court of the State of New York has asserted or attempted to exercise a "power to restrict and limit fees whenever it sees fit so to do" (quoting from our claim at page 13 of the Jurisdictional Statement). Appellees apparently forget that, in their brief to the Supreme Court of the State of

New York (the court of original jurisdiction), they said (at page 24):

> "Nor are the standards promulgated [in Rule 4] inflexible; they can and will be revised to reflect changing economic or social conditions in this phase of the practice."

Here we have an admission by appellees that it is their intention, whenever *they* believe that fees should be rescheduled, in the light of "social" as well as "economic" conditions, to decide what the members of the bar in one restricted geographical area should be entitled to receive as their compensation for work actually done.

CONCLUSION

The motion to dismiss should be denied.

Respectfully submitted,

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